BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DAVID JAGGER	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,026,249
C & G DRILLING	)	
Respondent	)	
AND	)	
	)	
AMERICAN HOME ASSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier appealed the November 19, 2007, Award entered by Administrative Law Judge Brad E. Avery. The Workers Compensation Board heard oral argument on February 20, 2008.

APPEARANCES

Stanley R. Ausemus of Emporia, Kansas, appeared for claimant. William G. Belden of Merriam, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award. The record also includes the September 4, 2007, medical report prepared by Dr. Joseph W. Huston, whom the Judge selected to evaluate claimant. In addition, by stipulation filed with the Board on January 17, 2008, the parties agreed the following documents were part of the record:

1. Greenwood County Hospital records, which include a bill for services rendered to claimant on September 6 and November 22, 2005, and January 9, 2006;

2. An AIG Claims Services review showing payment to Dr. Michael D. McClintick for services rendered from November 18, 2005, through January 11, 2006;

3. A Susan B. Allen Memorial Hospital bill in the sum of $3,293 that was incurred at the authorization of Dr. McClintick.

At oral argument before the Board (and by written stipulation), the parties agreed the record included the documents that Dr. Peter V. Bieri used to express his task loss opinions considering the respective task lists prepared by Terry L. Cordray and Doug Lindahl.[1] Finally, in a letter received by the Board on February 25, 2008, the parties stipulated that claimant incurred outstanding medical expense on December 23, 2005, at Susan Allen[2] Hospital in the sum of $3,293 and at Greenwood County Hospital on September 6 and November 22, 2005, and January 9, 2006, in the sum of $4,962.29, all of which are subject to the Workers Compensation fee schedule.

ISSUES

This is a claim for an August 31, 2005, accident and the resulting injuries to claimant's ribs and right ankle. In the November 19, 2007, Award, Judge Avery found claimant sustained a permanent rib injury, which comprised a three percent whole person functional impairment. The Judge also determined claimant sustained a 76.5 percent work disability[3] until February 4, 2007, when he obtained another job earning more than his pre-injury average weekly wage. The 76.5 percent work disability was based upon a 53 percent task loss and a 100 percent wage loss.

In addition, the Judge found respondent was responsible for "any medical expense related to the cure and relief of symptoms of [claimant's] accidental injury."[4] The Judge also assessed prejudgment interest against respondent under K.S.A. 44-512b as respondent did not have just cause to withhold compensating claimant for the wage loss that respondent created by terminating his employment. The Judge reasoned:

> Although respondent denied the compensability of the claim, it submitted absolutely no evidence calling into question whether claimant suffered personal injury by accident which arose out of and occurred in the course of his employment with the respondent. In addition, claimant's undisputed testimony indicates

[1] In November 2007, the parties prepared and filed a written stipulation placing those documents into the record. But the stipulation and attached documents were not received by the Judge until the day after the Award was entered.

[2] The stipulation states Ellen but that appears to be a typographical error.

[3] A permanent partial disability under K.S.A. 44-510e that is greater than the whole person functional impairment rating.

[4] ALJ Award (Nov. 19, 2007) at 3.

> representatives of the employer witnessed the accident in question. The employer provided no medical care and subsequently terminated the claimant.
>
> Respondent knew prior to this award the date when claimant resumed working at his new job, his task loss and wage loss prior to the date of this award. Respondent was aware when it terminated the claimant because of his age (and after he suffered a workers compensation injury) that it was creating a 100 percent wage loss. The court received no argument from the respondent [that] claimant had failed to exercise good faith in attempting to find appropriate employment.
>
> Presuming arguendo the respondent could not reasonably calculate a task loss until it was determined by the court, the employer lacked just cause for not compensating claimant for his wage loss prior to the award. The 74.57 weeks of permanent partial disability awarded represents only the period of time which ensued between the time of claimant's accidental injury and the date upon which claimant found comparable wage employment, not the period which would be awarded if claimant's task loss remained 100 percent.
>
> While there was a dispute in the evidence regarding the percentage of claimant's functional impairment, there is no requirement functional impairment be present in the case of work disability. *McLaug[h]lin v. Excel Corp[.]* 14 Kan. App. 2nd 44 (1989). The court invited the respondent's attorney to submit evidence regarding why interest should not be assessed, but the respondent chose not to provide evidence or a brief regarding this issue. Interest is assessed at the prejudgment rate of 10.25 percent for 114.20 weeks between the date of the accident and the writing of this award in the amount of $7,845.32 and continues at the rate of $68.70 per week until the award is paid in full.[5]

Finally, the Judge declined respondent's request that claimant's Social Security retirement benefits be credited against his award of disability benefits. The Judge ruled respondent failed to prove the amount of benefits claimant was being paid.

Respondent contends Judge Avery erred. First, respondent requests the Board to remand the claim for additional evidence as the parties had agreed to extend their terminal dates and the Judge apparently did not receive their stipulation before issuing the Award. Next, respondent contends claimant should not receive any permanent disability benefits as he sustained neither permanent functional impairment nor any task loss. Respondent also argues the Judge erred as he failed to specify the amount of medical expense to be paid as allegedly required by K.S.A. 44-525. In addition, respondent argues prejudgment interest should not be assessed under K.S.A. 44-512b as there was a good faith dispute between the parties regarding the nature and extent of claimant's injuries. And finally,

[5] *Id.* at 5, 6.

respondent requests a credit against claimant's permanent disability benefits for the Social Security retirement benefits claimant receives.

In summary, respondent requests the Board to deny claimant's request for permanent disability benefits, modify the order for payment of medical expenses, reverse the award of pre-award interest, and grant respondent a credit for the Social Security retirement benefits claimant receives. In the alternative, respondent requests the Board to remand the claim to the Judge for additional evidence.

Conversely, claimant contends the November 19, 2007, Award should be affirmed. Claimant argues remand is unnecessary as the parties have supplemented the record and it is now complete.

The issues before the Board on this appeal are:

1. Should the claim be remanded for additional evidence?

2. What is the nature and extent of claimant's injury and disability?

3. What medical expense did claimant incur?

4. Should prejudgment interest be assessed against respondent under K.S.A. 44-512b?

5. Is respondent entitled to a credit under K.S.A. 2005 Supp. 44-501(h) due to claimant's receipt of Social Security benefits?

FINDINGS OF FACT

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes:

Respondent employed claimant as a driller on an oil rig. On August 31, 2005, claimant slipped and fell approximately four feet into the basket where drill pipe was placed. Claimant's testimony is uncontradicted that his fall was witnessed by one of respondent's owners. Claimant described his accident, as follows:

> Yes, sir, we was laying down drill pipe. A wet string they call it and so the floor was wet and it's an all-steel floor. I slipped and fell reaching for a piece of drill pipe that was being laid down and fell into the baskets where the drill pipe are placed.[6]

Claimant felt immediate pain in his ribs and right ankle. Despite experiencing severe pain, claimant finished the workday and also worked the next two days before being off for the Labor Day holiday. That weekend, however, the "main boss" came to claimant's home and fired him. Claimant's testimony is uncontradicted he was told he was too old to keep up.[7] According to claimant, he was 75 years old at the time and receiving Social Security retirement benefits in the sum of "$900 something" per month.[8]

The following day claimant sought medical treatment. After being x-rayed, claimant was told he had two fractured ribs and that he had twisted his rib cage and ankle. He was initially given a brace for his ankle and later given a brace for his ribs. Over the next several months, claimant received various medical tests in an attempt to determine the cause of his ongoing pain. A whole body bone scan performed in November 2005 indicated claimant had a rib fracture on the right and questionable changes to two other ribs. A CT scan of claimant's abdomen in January 2006 suggested a possible injury to claimant's liver.

At his July 2007 regular hearing, claimant was still experiencing pain from his August 2005 accident. Claimant testified he could not lift very much, could not twist, could not walk very far, had pain with certain activities, had right ankle swelling, and that his ankle would give way.

After being terminated, claimant began looking for work with other employers. He estimated he made approximately 100 contacts over a two-year period before finding another position with an oil company in South America. Accordingly, on approximately February 4, 2007, claimant commenced working for that company as a drilling consultant and began receiving $4,000 per month in wages, his expenses, and company stock. By the July 2007 regular hearing, claimant's Social Security retirement benefits had increased to $1,124 per month.

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[6] R.H. Trans. at 10.

[7] R.H. Trans. at 13.

[8] *Id.* at 25.

Nature and extent of injury and impairment

The record contains three medical opinions that address claimant's impairment. In early February 2006, at his attorney's request, claimant was evaluated by Dr. Pedro A. Murati, who is board-certified in physical medicine and rehabilitation, electrodiagnosis, and independent medical evaluations. After reviewing claimant's medical treatment records and examining claimant, the doctor diagnosed bilateral costal chondritis, which the doctor explained was a separation of cartilage from the bone causing chronic pain.

Dr. Murati found tenderness in claimant's neck, but the doctor could not relate that symptom to claimant's accident at work. The doctor also determined claimant had suffered a mild stroke that affected both his right upper and right lower extremities. But Dr. Murati did not relate the stroke to claimant's accident at work.

Citing chapter and page of the AMA *Guides*[9], Dr. Murati rated claimant as having a three percent whole person impairment for his rib injury. The doctor did not rate claimant's right ankle. Regarding the rib injury, the doctor noted the AMA *Guides* does not specifically address the type of injury claimant sustained; therefore, the doctor used the chapter regarding pain. Dr. Murati testified, in pertinent part:

> Well, normally we like to use Chapter 3 of the Fourth Edition. In this case they don't address this painful condition in any of the tables there. So you have to use the pain chapter that's allowed by the guides. Any painful chronic condition can be rated as per Chapter 15.[10]
>
> . . . .
>
> Well, you know, you have to have some objective findings. For example, when I examined him he was tender over the costal chondral junctions and it made sense than an injury like that, he kept complaining of rib pain. Well, yes, it all makes sense. I didn't find the patient to be malingering or magnifying his symptoms. You know, the history makes sense, the findings during physical examination make sense. There's no table in Chapter 3 that talks about costal chondritis. As a matter of fact, nothing in the book talks about costal chondritis, but it is a condition that produces pain. So that's the most appropriate chapter, I thought, which is the one I use for this type of problem is the pain chapter.[11]

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[9] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

[10] Murati Depo. at 14, 15.

[11] *Id.* at 23, 24.

In reaching his diagnosis, Dr. Murati considered chest x-rays from September 2005 that indicated "'mild blunting of the left costophrenic angle that may reflect mild pleural fluid and pleural reaction from recent injury'" and a whole body bone scan from November 2005 that showed "[a]bnormal activity involving an anterior rib on the right in the area of the seventh rib" and mild activity "in the area of the ninth and tenth rib posteriorly on the right", which were consistent with acute bony injury.[12]

Moreover, Dr. Murati recommended claimant observe work restrictions – no heavy grasping with his right arm and no more than 35 pounds occasional lifting and 20 pounds frequent lifting. After reviewing a list of former work tasks prepared by claimant's vocational expert, Doug Lindahl, the doctor opined claimant should no longer perform 16 of the 30 tasks, or approximately 53 percent.[13]

In early April 2007, at respondent's request, claimant was examined by Dr. Peter V. Bieri, who is board-certified in independent medical evaluations. Dr. Bieri disagreed with Dr. Murati's diagnosis as his examination revealed no findings consistent with bilateral costochondritis. Indeed, Dr. Bieri indicated that diagnosis was not substantiated by history, documentation, or radiographic findings. Likewise, Dr. Bieri disagreed with Dr. Murati's functional impairment rating as Dr. Bieri concluded claimant failed to meet the criteria for permanent impairment under the AMA *Guides*.[14] The doctor wrote, in part:

> Based on the appropriate issue of the AMA *Guides*, there is no permanent impairment directly attributable to rib fracture. While the claimant has complaints of persistent pain, with reference to page 304, "chronic pain and pain-related behavior are not, *per se*, impairments".
>
> Based on the AMA *Guides to the Evaluation of Permanent Impairment*, Fourth Edition, the claimant fails to meet the criteria for permanent impairment on the basis of pain secondary to alleged injury on or about August 31, 2005.
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> He further fails to meet the criteria for additional permanent impairment involving the head and neck, or right lower extremity, attributable to the injury in question.[15]

Based upon the objective findings only, Dr. Bieri would not restrict claimant's activities. But due to claimant's subjective complaints of right anterior rib pain, the doctor

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[12] *Id.*, Ex. 2, Murati report (Feb. 6, 2006) at 1, 2.

[13] *Id.* at 16.

[14] Bieri Depo. at 10.

[15] *Id.*, Ex. 2 at 6.

recommended claimant be restricted from lifting greater than 40 pounds more than occasionally, lifting more than 25 pounds frequently, and lifting more than 15 pounds constantly. In addition, the doctor recommended that claimant limit repetitive twisting and rotation at the waist to no more than occasionally to frequently.[16]

Dr. Bieri indicated there was no specific provision in the *Guides* addressing rib fractures and he did not give claimant an impairment rating for chronic pain. Moreover, he testified he was unaware he could go outside the AMA *Guides* to rate a worker when the *Guides* does not address a worker's injury or condition.[17] Nonetheless, the doctor believed claimant's ongoing pain may constitute a disability. Dr. Bieri testified, in part:

> Q. (Mr. Ausemus) Am I understanding you to say, Doctor, that this man suffered a disability as a result of this accident, but because of the Guides, you can't give an impairment rating?
>
> A. (Dr. Bieri) That's correct.
>
> Q. And the disability -- well, strike that.
>
> And you're unable or you're unwilling at this time to give a rating because of his chronic pain?
>
> A. I cannot do that based on the Guides, that's correct. I don't dispute the fact that he has pain, I do not minimize it, I think it's the basis for a disability. This particular area fails to meet the criteria for a percentage based on the Guides.
>
> Q. And the Guides never talk about ribs?
>
> A. Not for purposes of permanent impairment, that's correct.
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> Q. I don't think they ever talk about the ribs. If you look in the index, it never mentions it.
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> A. I think you're right.[18]

Reviewing the task list prepared by respondent's vocational expert, Terry L. Cordray, Dr. Bieri concluded claimant lost the ability to perform 12 of 35 tasks, or approximately 34

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[16] *Id.* at 12.

[17] *Id.* at 21.

[18] *Id.* at 26, 27.

percent. But reviewing Mr. Lindahl's list, Dr. Bieri determined claimant had lost the ability to perform 12 of 30 tasks, or 40 percent.

In addition, Dr. Bieri did not find any permanent impairment for claimant's right ankle despite his subjective complaints. And the doctor noted that assigning permanent work restrictions with regard to claimant's right ankle was somewhat complex as claimant had an old fracture in the right foot that contributed to his symptoms and claimant also had a stroke that may have caused gait abnormalities.

The last medical opinion in the record was provided by Dr. Joseph W. Huston, who examined claimant in early September 2007 at the Judge's request. Dr. Huston's letterhead indicates he is board-certified in orthopedic surgery and a Fellow in the American Academy of Disability Evaluating Physicians. Dr. Huston concluded claimant did "not demonstrate significant continuing problems in either the right rib cage and right ankle that would result in permanent impairment rating."[19]

During his examination, Dr. Huston noted claimant's costochondral area was not tender and there was no palpable or visible deformity. And although Dr. Huston indicated claimant had intermittent and mild discomfort in his right ankle, right rib cage and neck, the doctor did not find "specific loss of task performing ability in relation to the injuries of [August 31, 2005]." Instead, the doctor attributed claimant's loss of task performing ability to age. Dr. Huston concluded:

> This man was injured in a fall at work when he slipped on a wet surface on 8-31-05 which is now two years ago. He had contusion and possible right rib fractures. History and the records suggest a right ankle sprain with no evidence of fracture and a cervical strain with preexisting multi-level degenerative disc disease in the neck. He continues to have intermittent and mild discomfort symptoms in the right ankle and the right rib cage and the neck. I believe any and all neck symptoms would be from the underlying degenerative disc disease and not from the injury of 8-31-05. My examination today does not demonstrate significant continuing problems in either the right rib cage and right ankle that would result in permanent impairment rating. I anticipate no future medical work-up or treatment which would be specifically needed in regard to the injuries of 8-31-05. Likewise, I do not find specific loss of task performing ability in relation to the injuries of that date. Certainly, he does have some loss of task performing ability in relation to his present age of 77.[20]

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[19] Huston Report (Sept. 4, 2007) at 5.

[20] *Id.*

The Board finds claimant injured his rib cage in the August 2005 accident and he continues to experience pain in his right rib cage that is aggravated by repetitive twisting and bending. The Board rejects Dr. Murati's three percent whole person impairment as he diagnosed costochondritis but both Dr. Bieri and Dr. Huston failed to find tenderness in the costochondral areas. Indeed, Dr. Bieri indicated Dr. Murati's bilateral costochondritis diagnosis was not supported by history, documentation, or radiographic tests. In short, Dr. Murati's diagnosis is not persuasive as the other doctors' examinations are much more recent and present a better idea of claimant's permanent condition.

The Board also finds that claimant's injury is not addressed by the fourth edition of the AMA *Guides* and, therefore, his injury could be rated by using standards other than those contained in the *Guides*. The Board finds claimant sustained permanent injury and impairment due to his rib cage injury, but claimant failed to prove the extent of that permanent impairment.

Based upon Dr. Bieri's opinion that claimant's rib cage injury warranted work restrictions, the Board finds claimant has sustained a 37 percent task loss because of his August 2005 accident. The 37 percent task loss is derived by averaging the 34 percent and 40 percent task loss percentages that Dr. Bieri found when considering the respective task lists of Mr. Cordray and Mr. Lindahl.

CONCLUSIONS OF LAW

Request for remand

The parties had agreed to extend their terminal dates before the Judge entered the Award. Accordingly, the parties executed an agreed order and forwarded it the Judge, who apparently did not receive the document. For purposes of the Board's review, the parties have supplemented the record with the documents they intended to present to the Judge. Respondent has cited no additional evidence that it would introduce should this matter be remanded. Indeed, at oral argument before the Board respondent's attorney stated he was requesting remand out of an abundance of caution. Because the Board accepts the additional evidence the parties have placed into the record, there is no reason to remand the claim to the Judge at this time. The Board concludes respondent has failed to prove remand is warranted. Therefore, the request for remand should be denied.

Extent of disability

Claimant's rib injury is not included in the schedule of K.S.A. 44-510d; therefore, K.S.A. 44-510e is applicable, which provides, in part:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

But that statute must be read in light of *Foulk*[21] and *Copeland*.[22] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job, which the employer had offered. And in *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wage should be based upon the ability to earn wages rather than the actual wage being earned when the worker failed to make a good faith effort to find appropriate employment after recovering from the work injury.

> If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .[23]

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[21] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[22] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[23] *Id.* at 320.

The Kansas Court of Appeals in *Watson*[24] held that the failure to make a good faith effort to find appropriate employment does not automatically limit the permanent partial general disability to the functional impairment rating. Instead, the Court reiterated that when a worker failed to make a good faith effort to find employment, the post-injury wage for the permanent partial general disability formula should be based upon all the evidence, including expert testimony concerning the capacity to earn wages.

> In determining an appropriate disability award, if a finding is made that the claimant has not made a good faith effort to find employment, the factfinder *[sic]* must determine an appropriate post-injury wage based on all the evidence before it. This can include expert testimony concerning the capacity to earn wages.[25]

A literal reading of K.S.A. 44-510e would indicate claimant is entitled to receive a permanent partial general disability based upon his wage loss and his task loss. But the appellate courts have not always followed the literal language of the statute. Instead, the courts have, on occasion, added additional benchmarks for injured workers to satisfy before they become entitled to receive permanent disability benefits in excess of the functional impairment rating. For example, as indicated above, *Foulk*[26] and *Copeland*[27] held that workers must make a good faith effort to work or to find appropriate employment after their injuries before they are entitled to receive a work disability under K.S.A. 44-510e. And if the injured worker fails to prove good faith to find appropriate work, a post-injury wage must be imputed. Assuredly, the concepts of good faith effort and imputing wages are neither mentioned in K.S.A. 44-510e or any other statute in the Workers Compensation Act.

In *Ramirez*[28], the Kansas Court of Appeals again departed from the literal language of K.S.A. 44-510e and held a worker who had injured his upper extremities was not entitled to a work disability because the worker had failed to disclose an earlier back injury in a pre-employment application. But the Workers Compensation Act contains no provision that an incomplete or erroneous pre-employment application precludes an award of work disability. Indeed, the injured worker in *Ramirez* probably felt the court's holding was especially punitive as the injury that was not disclosed in the pre-employment application was not related in any manner to the injury he later sustained.

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[24] *Watson v. Johnson Controls, Inc.*, 29 Kan. App. 2d 1078, 36 P.3d 323 (2001).

[25] *Id.* at Syl. ¶ 4.

[26] *Foulk*, *supra*.

[27] *Copeland*, *supra*.

[28] *Ramirez v. Excel Corp.*, 26 Kan. App. 2d 139, 979 P.2d 1261, *rev. denied* 267 Kan. 889 (1999).

And in *Mahan*[29], the Kansas Court of Appeals held that when an employee has failed to make a good faith effort to retain his or her current employment, *any* showing of even the potential for accommodated work at the same or similar wage rate precludes an award for work disability.

> We hold that where the employee has failed to make a good faith effort to retain his or her current employment, a showing of the *potential* for accommodation at the same or similar wage rate precludes an award for work disability. It would be unfair under circumstances where the employee has refused to make himself or herself eligible for reemployment to require the employer to show that the employee was specifically *offered* accommodated employment at the same or similar wage rate.[30]

Again, the Act contains no such provision that failing to make a good faith effort to retain employment is a valid defense to a claim for disability benefits. Indeed, in *Oliver*[31] the Kansas Court of Appeals held that neither K.S.A. 1998 Supp. 44-510e(a) nor Kansas case law required an injured worker to always seek post-injury accommodated work from his or her employer before seeking work elsewhere. And in *Rash*[32], the Kansas Court of Appeals held the offering or accepting of accommodated employment was simply another factor in determining whether the employee had engaged in a good faith effort to seek appropriate employment.

> Heartland would have us punish employees with a harsher result for not accepting accommodated employment. This argument is contrary to *Oliver*. The lesson from *Oliver* is that an employer is not required to offer accommodated employment. Equally, an employee is not required to accept an offer of accommodated employment from his or her employer. *The offering or accepting of accommodated employment is simply another factor in determining whether the employee has engaged in a good faith effort to seek appropriate employment.* An employee who rejects an offer of accommodated employment has a good faith duty to seek appropriate employment within his or her restrictions. If the employee fails in this effort, "the factfinder *[sic]* will have to determine an appropriate post-injury

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[29] *Mahan v. Clarkson Constr. Co.*, 36 Kan. App. 2d 317, 138 P.3d 790, *rev. denied* 282 Kan. ___ (2006).

[30] *Id.* at 321.

[31] *Oliver v. Boeing Co.*, 26 Kan. App. 2d 74, 977 P.2d 288, *rev. denied* 267 Kan. 889 (1999).

[32] *Rash v. Heartland Cement Co.*, 37 Kan. App. 2d 175, 154 P.3d 15 (2006).

> wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages." *Copeland*, 24 Kan. App. 2d at 320.[33]

The Kansas Supreme Court, however, has recently sent two strong signals that the Workers Compensation Act should be applied as written. In *Graham*[34], the Kansas Supreme Court rejected an interpretation of the wage loss prong in the work disability formula that did not comport with the literal reading of K.S.A. 44-510e. The Kansas Supreme Court wrote, in part:

> When a statute is plain and unambiguous, a court must give effect to its express language, rather than determine what the law should or should not be. The court will not speculate on legislative intent and will not read the statute to add something not readily found in it. If the statute's language is clear, there is no need to resort to statutory construction.[35]

Moreover, in *Casco*[36], the Kansas Supreme Court overturned 75 years of precedent on the basis that earlier decisions did not follow the literal language of the Act. The Court wrote:

> When construing statutes, we are required to give effect to the legislative intent if that intent can be ascertained. When a statute is plain and unambiguous, we must give effect to the legislature's intention as expressed, rather than determine what the law should or should not be. A statute should not be read to add that which is not contained in the language of the statute or to read out what, as a matter of ordinary language, is included in the statute.[37]

Despite the Kansas Supreme Court's clear signals to follow the literal language of the Act, it is not for this Board to substitute its judgment for that of the appellate courts. The Board, therefore, will continue to follow the *Foulk* and *Copeland* line of cases until an appellate court decides that K.S.A. 44-510e(a) does not require the fact finder to impute a wage based upon a worker's wage earning ability whenever an injured worker fails to prove he or she made a good faith effort to find appropriate employment post-injury.

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[33] *Id.* at 185 (emphasis added).

[34] *Graham v. Dokter Trucking Group*, 284 Kan. 547, 161 P.3d 695 (2007).

[35] *Id.* at Syl. ¶ 3.

[36] *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494 (2007).

[37] *Id.* at Syl. ¶ 6.

For that period claimant was off work from September 3, 2005, until approximately February 4, 2007, claimant had a 100 percent wage loss for purposes of the permanent partial disability formula of K.S.A. 44-510e. The Board finds claimant made a good faith job search during that period to find other employment.

Averaging the 100 percent wage loss with his 37 percent task loss yields a 69 percent permanent partial disability for the period from September 3, 2005, through February 3, 2007. Commencing February 4, 2007, claimant began earning a wage that was sufficient to eliminate his work disability. Consequently, claimant's permanent disability benefits end that date due to the accelerated payout provisions set forth in the Workers Compensation Act.

Medical expenses

As indicated above, the parties stipulated claimant incurred outstanding medical expense on December 23, 2005, at Susan Allen Hospital in the sum of $3,293 and at Greenwood County Hospital on September 6 and November 22, 2005, and January 9, 2006, in the sum of $4,962.29. Respondent is responsible for that medical expense, subject, however, to the Workers Compensation fee schedule.

Prejudgment interest

Because respondent fired claimant and, thus, created his 100 percent wage loss, the Judge found respondent lacked just cause for failing to compensate claimant for his wage loss before the award. The Workers Compensation Act provides that a judge may assess interest when an employer or its insurance carrier without just cause or excuse fails to pay compensation before an award.[38]

The Board concludes the order requiring respondent to pay interest should be set aside. As indicated above, the doctors who evaluated claimant had a somewhat difficult time of diagnosing his injury and its effects. Dr. Murati concluded claimant's cartilage had torn away from one or more of his ribs and that he had sustained a permanent impairment. Dr. Bieri concluded claimant's injury was more in line with a fractured rib, but that he sustained no rateable permanent impairment per the AMA *Guides*. And Dr. Huston, who was selected by the Judge, determined claimant sustained no impairment and needed no permanent restrictions. Accordingly, there were legitimate questions concerning the nature and extent of claimant's injury and disability while the parties litigated this claim. Accordingly, before the Award there existed just cause and excuse to delay paying claimant his permanent disability benefits.

[38] See K.S.A. 44-512b.

Social security credit

At the time of his accident, claimant was receiving Social Security retirement benefits, which claimant estimated comprised around $900 per month. By the time of the regular hearing, those benefits had increased to $1,124 per month. In K.S.A. 2005 Supp. 44-501(h), the Workers Compensation Act provides that Social Security retirement benefits may reduce a worker's weekly compensation payment. That credit or offset does not apply, however, when a worker is injured while drawing Social Security retirement benefits as the courts reason the worker is supplementing his Social Security benefits by continuing to work and, thus, there will not be a duplication of benefits.[39]

Because claimant was both working and drawing Social Security retirement benefits at the time of his August 2005 accident, the credit does not apply and claimant's workers compensation benefits should not be reduced.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.[40] Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, the Board modifies the November 19, 2007, Award as follows:

David Jagger is granted compensation from C & G Drilling, Inc., and its insurance carrier for an August 31, 2005, accident and resulting disability. Based upon an average weekly wage of $842.50, for the period from September 3, 2005, through February 3, 2007, Mr. Jagger is entitled to receive 74.14 weeks of permanent partial general disability benefits at $467 per week, or $34,623.38, for a 69 percent permanent partial general disability, making a total award of $34,623.38, which is all due and owing less any amounts previously paid.

Respondent is responsible for the medical expense set forth on page 15 of this Order, subject to the Workers Compensation fee schedule.

The Board sets aside the order requiring respondent to pay interest.

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[39] See *Dickens v. Pizza Co.*, 266 Kan. 1066, 974 P.2d 601 (1999).

[40] K.S.A. 2007 Supp. 44-555c(k).

The Board denies respondent's request for a Social Security retirement benefit credit.

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of April, 2008.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Stanley R. Ausemus, Attorney for Claimant
William G. Belden, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge